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Supreme Court, U.S.
FILED

No. _____

08-292 SEP 2-2008

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In The

Supreme Court of the United States

DARYL DAHLQUIST,

Petitioner,

v.

CITY OF KENT, WASHINGTON,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Washington

PETITION FOR A WRIT OF CERTIORARI

DARYL DAHLQUIST
Petitioner, Pro se
15238 SE 272d Street
Kent, WA 98042
253-631-2906

QUESTIONS PRESENTED FOR REVIEW

I. Whether the Superior Court of Washington State and the Court of Appeals of Washington State, improperly grant defendants' CR 12(b)(6) motion for dismissal based upon the state common law witness immunity or privilege as applied to a claim of retaliation against a person with a disability under the Americans with Disabilities Act of 1990?

II. Whether the state common law witness immunity or privilege, personal to the witness, extend to the witness' employer?

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PETITION FOR WRIT OF CERTIORARI

DARYL DAHLQUIST (DAHLQUIST) respectfully prays that a Writ of Certiorari issue to review the Washington Court of Appeals Commissioner's ruling Granting Motion on the Merits to Affirm in *Dahlquist v. City of Kent et al.*, No. 57879-1-1 (June 5, 2007), on the grounds that it violates Article VI of the U.S. Constitution (Supremacy Clause) by not allowing the federal Americans with Disabilities Act statute regarding a retaliation claim to preempt Washington State common law witness immunity.

OPINIONS BELOW

Dahlquist v. City of Kent, et al., Order, Washington Supreme Court No. 80718-3 (June 4, 2008) App. 14.

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Dahlquist v. City of Kent, et al., Commissioner's Ruling Granting Motion on The Merits to Affirm, Court of Appeals of the State of Washington, Division One, No. 57879-1-I (June 5, 2007) App. 1.

Dahlquist v. City of Kent, et al., Order Granting Defendant's Motion to Dismiss, and Order on Defendant's Motion for CR 11 Sanctions, Superior Court of

Washington in and for the County of King, February 3, 2006. App. 12.

JURISDICTION

The instant Petition is filed under 28 U.S.C. § 1257 and the Washington Court of Appeals decision to be reviewed was entered on June 5, 2007.

CONSTITUTIONAL PROVISIONS

Article VI, U.S. Constitution

STATEMENT OF THE CASE

Daryl Dahlquist claimed that he is a disabled person who claimed that he was the victim of discrimination at The Kent City Jail. In trial of his original discrimination claim Dahlquist submitted that four law enforcement officers of the City of Kent testified falsely against him regarding Dahlquist's use of a medical bracelet used to alert individuals of his disability. The officers said the bracelet didn't exist. Dahlquist countered that it did exist and that the officers were dishonest in their testimony. The second lawsuit that is the basis of this petition was against the City of Kent, the Mayor of Kent, and four named law enforcement officers. That lawsuit was based on claims that the officers retaliated against

him for exercising his rights as a disabled person in the first lawsuit. In the second lawsuit, the trial court dismissed the claims by deciding that the common law witness immunity, or privilege, prevented Dahlquist from pursuing his claims. Dahlquist claims that his federal statutory rights under the ADA, and his federal rights to claim acts of retaliation against a disabled person, preempted any state immunity applicable to a witness; and he claims that the witness immunity is personal to the witness and does not immunize the employer of the witness.

REASONS FOR GRANTING THE WRIT

Dahlquist submits that the law in Washington is in conflict with federal law regarding immunities which would apply to the Americans with Disabilities Act of 1990. He believes that there is little case law in the State of Washington which helps to resolve the issue. He argues that his claim involves issues of substantial public interest.[1]

Dahlquist makes two claims: (1) that the state's common law witness immunity does not apply to the federal ADA statute as regards a retaliation claim;

[1] "Dahlquist's appeal is very nearly frivolous. But his argument that federal law may preempt the privilege is not frivolous and there is no case dealing directly with application of the witness privilege to the ADA. Resolving all doubts in Dahlquist's favor, the appeal will not be characterized as frivolous." App. 9.

and (2) he claims that the common law witness privilege is personal to the witness only and does not extend in this case to the witness' employer, the City of Kent or the Mayor of Kent.

RAP 13.4 establishes the considerations governing whether or not the Supreme Court will accept review of a lower court decision RAP 13.4(b). Dahlquist argues that the decision of the lower court is in conflict with a ruling of the State of Washington Supreme Court in *Savage v. State*, 127 Wn.2d 434, 899 P.2d 1270 (1995), regarding the question of whether the immunity of an employee or agent extends to immunize the employee's employer or the agent's principal.

Dahlquist acknowledges the common law witness immunity or privilege. He submits that this should not extend to public officers in this context. He claims also that the common law privilege does not extend to federal statutory causes of action such as the Americans with Disabilities Act of 1990. Constitutional issues also are suggested by the claim that under the Supremacy Clause of the United States Constitution, Dahlquist's federal statutory rights preempt Washington's common law witness immunity. Article VI, U.S. Constitution.

I. The state common law witness immunity or privilege should not apply to a federal claim of retaliation under the Americans with Disabilities Act of 1990.

The definition of retaliation under the ADA is broad:

> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this Act 42 U.S.C. § 12203(a).

Under CR 12(b)(6), Dahlquist's allegations are assumed to be true, *Hoffer v. State*, 110 Wn.2d 415, 755 P.2d 781 (1988). Because no answer was filed before the motion to dismiss, the affirmative defense of qualified immunity was not raised and should not be considered, *Gomez v. Toledo*, 446 U.S. 635 (1980). For that reason, the only basis for the dismissal of the case is application of the absolute witness privilege or immunity. In this case, four law enforcement officers have testified that Dahlquist did not have a bracelet on at the time when he was in the Kent City Jail, which warned officers of the vulnerability of his arms and shoulders to mistreatment. Dahlquist asserts that this false testimony was a form of retaliation against him because he sued the City of Kent for failure to properly accommodate his disabilities as required by the Americans with Disabilities Act of 1990 (ADA). Dahlquist claims that the common law

witness immunity in Washington does not extend to the rights provided under the Americans with Disabilities Act of 1990 when there is a claim of retaliation under the ADA.

The Commissioner's ruling in this case appears to be based primarily upon the perception that the same privileges apply to the ADA as the privileges which apply to the Federal Civil Rights Act, 42 U.S.C. § 1983. App. 5 through App. 7. The Federal Civil Rights Act was enacted in 1871 shortly after the Civil War. *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983). The Americans with Disabilities Act of 1990 was enacted more than a century later. The Federal Civil Rights Act recognized immunities existing at the time of enactment of that statute, Ibid., 330. There doesn't appear to be case law which expressly absorbs the same immunities into the ADA.

The two statutes are not identically extensive. Under the Federal Civil Rights Act, principles of vicarious liability do not apply so as to hold the employer or principal responsible for the misbehavior of the employee or agent. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). This is not so under the ADA. *Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001). Under the Federal Civil Rights Act, a governmental entity or employer is not entitled to qualified immunity, which is personal to the state agent or actor. *Owen v. City of Independence*, 445 U.S. 622 (1980). The ADA, unlike the Federal Civil Rights Act,

is not limited to defendants who are acting under color of state law. *Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001).

The Commissioner determined that the ADA prohibits discrimination by a "public entity" but does not extend to individual liability, citing *Walsh v. Nevada Dept. of Human Resources*, 471 F.3d 1033, 1037-38 (9th Cir. 2006). App. 6. However, the *Walsh* case didn't deal with the issue of retaliation; it was concerned with the issue of whether or not the entity itself discriminated by failing to accommodate a disability. This was the issue in Dahlquist's first lawsuit. He wasn't required to win the first lawsuit in order to claim retaliation. *Treglia v. Town of Manlius*, 313 F.3d 713 (2d Cir. 2002).

The Commissioner also determined that a claim under the ADA is subject to the defense of qualified immunity, *Bartell v. Lohiser*, 215 F.3d 550, 557 (6th Cir. 2000). App. 7. If the affirmative defense of qualified immunity was not pled in this case, the Court should not apply it despite the failure of the defendants to raise the issue. *Gomez*, supra. The defense of qualified immunity was not raised by the defendants as an affirmative defense against claims of retaliation.

The Ninth Circuit has held that the witness litigation privilege does not apply to an ADA action. *Pardi v. Kaiser Foundation Hospitals*, 389 F.3d 840 (9th Cir. 2004). That court noted a similar ruling by the Seventh Circuit in *Steffes v. Steppan Co.*, 144 F.3d 1070, 1074 (7th Cir. 1998). *Pardi* quotes *Steffes*

stating: "A state absolute litigation privilege purporting to confer immunity from suit cannot defeat a federal cause of action." *Pardi*, supra 852. The court in *Pardi* found that the Supremacy Clause of the United States Constitution gives Congress the power to preempt state and local law such as laws relating to privileges. *Pardi,* supra 852, citing *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 667 (9th Cir. 2003).

The Commissioner's ruling was based in substantial part upon the U.S. Supreme Court decision in *Briscoe v. LaHue*, 460 U.S. 325; 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983). App. 5 through App. 6. That case held that the common law witness privilege, in existence in 1871 at the time of enactment of 42 U.S.C. § 1983, applied to Civil Rights cases. *Briscoe* affirmed a ruling of the Seventh Circuit that witnesses were absolutely immune from damages in a 42 U.S.C. § 1983 case. On the other hand, the Seventh Circuit did not extend its ruling in *Briscoe* to ADA claims. *Steffes*, supra.

The Court of Appeals has suggested that the common law witness immunity may not be so absolute in Washington as it may have been in the past. *Wynn v. Earin*, 131 Wn. App. 28, 125 P.3d 829, review granted, 158 Wn.2d 1001 (2006). App. 7. Although *Wynn* dealt with a distinguishable issue, involving pre-litigation statements rather than statements made at trial, the court in *Wynn* suggested that a second look at the immunity might be appropriate: "Absolute immunity is a 'blunt instrument' solely in

defense of a compelling public interest." *Wynn*, supra, p. 40.

II. The common law witness immunity is personal to the witness and does not immunize the witness' employer.

The Court of Appeals' Commissioner found that Dahlquist didn't raise at the right time the issue of whether or not the absolute witness immunity principle would extend to an employer of the witness' in an ADA case. The Commissioner cited a case which suggested that the witness' immunity extends to the witness' employer or principal. *Cloutier v. Epping*, 714 F.2d 1184 (1st Cir. 1983). Under Washington law, this Court has held that the qualified immunity of an employee does not extend to the employer. *Savage v. State,* 127 Wn.2d 434, 899 P.2d 1270 (1995). In that case the court held that in Washington, if a parole officer was granted qualified personal immunity as a defense, that immunity would not establish a defense for the parole officer's principal or the employer, in that case, the State of Washington. *Savage*, supra 439.

The Commissioner found that the immunity of the Kent City witnesses extended to the employer of the witness based upon *Cloutier.* App. 8. The *Cloutier* case, published in the same year as the ruling in *Briscoe,* involved a dispute over the development of a mobile home park in New Hampshire. *Cloutier* was not an ADA case. *Cloutier* applied the ruling in

Briscoe. The court in *Cloutier* applied the limitation of 42 U.S.C. § 1983, which does not permit application of principles of respondeat superior to hold a governmental employer liable for the wrong-doing of a governmental employee. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In a Federal Civil Rights Act case, the employee's governmental employer must have created an official policy or practice which caused a violation of another person's federal civil rights in order to be held liable. *Cloutier*, supra at 1191.

Although there is no vicarious liability in federal civil rights actions, there can be vicarious liability in ADA claims. *Duvall v. County of Kitsap*, 260 F.3d 1124 (9th Cir. 2001). Because respondeat superior exists under the ADA, *Savage*, and not *Cloutier* and 42 U.S.C. § 1983, would apply. Petitioner has an attorney who will argue his case before this Honorable Court.

CONCLUSION

Dahlquist has claimed that law enforcement officers testified falsely against him in a federal disability lawsuit. He claims that this was retaliation against him for commencing the disability lawsuit. Those allegations pursuant to CR 12(b)(6) must be treated as true. The only reason given for dismissal of this suit lies with a decision that the absolute common law witness immunity prevents Dahlquist from

continuing his lawsuit. But common law witness immunity may well be diminishing as a legal concept in Washington State. More importantly, Dahlquist claims that the overriding intent and breadth of the Americans with Disabilities Act of 1990, a newer and broader statute than the Federal Civil Rights Act of 1871, does not confer immunity on law enforcement officers who testify falsely against him or the City which employed those officers. Further, regardless of whether the witness immunity or privilege, applies to the ADA, that immunity, which is personal to the witness, does not immunize the employer, the City of Kent. Dahlquist's claim is a retaliation claim and not the claim in his first lawsuit against the Kent City Jail for failure to accommodate his disabilities. It does not matter that he lost his underlying claim if there has been retaliation against him for pursuit of that claim. For the reasons stated above, it is urged that the decision of the Washington State Court of appeals be reversed and remanded to the Superior Court for resumption of the lawsuit.

Respectfully submitted,

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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

DARYL LEROY DAHLQUIST,
Appellant,
v.
CITY OF KENT; KENT CITY JAIL; KENT POLICE DEPARTMENT; BRUCE WHITE, Mayor of the City of Kent, in his official capacity; DARIN MAJACK, PAUL PETER, HARVEY WENDERSKI and DAN MICHAELS, in their official capacity,
Respondent.

No. 57879-1-I

COMMISSIONER'S RULING GRANTING MOTION ON THE MERITS TO AFFIRM

(Filed Jun. 5, 2007)

Daryl Dahlquist (Dahlquist) appeals from a trial court order dismissing his suit against the City of Kent, the mayor, and four individuals who were police or corrections officers. This Court set a motion on the merits to affirm pursuant to RAP 18.14. The motion is granted.

FACTS

In 1996, Dahlquist was cited for trespassing and sent to jail. The jail refused to provide Dahlquist with a sleep apnea device and he sued, alleging a violation of the Americans with Disabilities Act (ADA). A jury

determined that Dahlquist was not disabled and denied his claim. Dahlquist appealed and this Court affirmed.[1]

Dahlquist sued the City again based on testimony its employees gave in the first suit. According to Dahlquist, he was wearing a medical alert bracelet at the time of his arrest but the four officers named in the present suit gave testimony which suggested he was not. One officer also gave testimony that suggested Dahlquist made unsubstantiated allegations that someone was trying to harm him. Dahlquist contends that this testimony impugned his credibility and prejudiced him before the jury.[2]

In his complaint, Dahlquist alleged that the officers' testimony was false and made in retaliation for his ADA claim. He sued the officers, and also alleged that the mayor failed to investigate his complaint. The trial court granted the City's motion to dismiss under CR 12(b)(6). Dahlquist has appealed.

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[1] *Dahlquist v. Kent*, cause number 51796-1-I, decided April 19, 2004.

[2] Dahlquist argued in his appeal that the trial court erred in admitting some of the testimony by the officers. In rejecting this argument, the Court of Appeals held that the issue was not preserved as to testimony given without objection, that there was not error as to other testimony, and that there was no prejudice.

CRITERIA FOR MOTION ON THE MERITS

RAP 18.14(e)(1) provides:

> A motion on the merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the . . . commissioner will consider all relevant factors including whether the issues on review, (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency.

These criteria are applied in light of *State v. Rolax*.[3]

DECISION

The trial court should dismiss a claim under CR 12(b)(6) only if it appears that the plaintiff cannot prove any set of facts, consistent with the complaint, that would entitle the plaintiff to relief. *Hoffer v. State of Washington*, 110 Wn.2d 415, 420, 755 P.2d 781 (1988). In passing on a motion to dismiss, the plaintiff's allegations are presumed to be true and the court may consider hypothetical facts. *Hoffer*, 110 Wn.2d at 420. A dismissal under the rule is reviewed *de novo*. *Hoffer*, 110 Wn.2d at 420.

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[3] 104 Wn.2d 129, 702 P.2d 1185 (1985).

The ADA prohibits retaliation for bringing an ADA claim. The relevant provision, 42 U.S.C. § 12203, provides:

> (a) Retaliation. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this Act.

Dahlquist maintains that the testimony he contends was false was given in retaliation for his pursuit of an ADA claim. The City maintains that the testimony, even if it is false, which the City denies, is not actionable.

Words spoken in the course of judicial proceedings, if they are applicable and pertinent to the subject of the proceeding, are absolutely privileged and cannot be the basis for a suit. *McClure v. Stretch*, 20 Wn.2d 460, 465-67, 147 P.2d 935 (1944). "Perjury is, of course, a public offense and punishable in criminal proceedings, but from earliest times the giving of false testimony has not been treated as a wrong actionable in civil proceedings." *W.G. Platts, Inc. v. Platts*, 73 Wn.2d 434, 440, 438 P.2d 867 (1968). In general, witnesses are absolutely immune from suit based on their testimony. *Bruce v. Byrne-Stevens & Assocs. Eng'rs*, 113 Wn.2d 123, 125, 776 P.2d 666 (1989). A conspiracy to give false testimony is also not actionable. *W.G. Platts*, 73 Wn.2d at 440-41; *House v. Belford*, 956 F.2d 711, 720 (7th Cir. 1992). The

defense of absolute privilege or immunity avoids *all* liability. *McNeal v. Allen*, 95 Wn.2d 265, 267, 621 P.2d 1285 (1980); *Gold Seal Chinchillas, Inc. v. State*, 69 Wn.2d 828, 830, 420 P.2d 698 (1966).

Dahlquist, however, maintains that the ADA preempts witness immunity.

> It is well established that the Supremacy Clause of the United States Constitution grants Congress the power "to preempt state and local laws." *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 667 (9th Cir. 2003). "State law is pre-empted to the extent that it actually conflicts with federal law." *Id.* (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79, 110 L. Ed. 2d 65, 110 S. Ct. 2270 (1990)). Thus, "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,'" the federal interests must prevail. *Id.*

Pardi v. Kaiser Permanente Hosp., Inc., 389 F.3d 840, 851 (9th Cir. 2004) (holding that California state litigation privilege does not bar claims under the ADA).

The United States Supreme Court examined a similar contention in *Briscoe v. LaHue*, 460 U.S. 325, 345-46, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983), and concluded that absolute testimonial immunity bars any claim for civil rights violations under 42 U.S.C. § 1983 based on an allegation of perjury. The Court presumed that the members of Congress were familiar with common law principles and intended them to

apply, absent specific provisions to the contrary. *Briscoe v. LaHue*, 460 U.S. at 330. It characterized the common law's protection for witnesses as so well grounded in history and reason that it refused to believe that Congress would intend to impinge on it by anything other than specific language. *Briscoe v. LaHue*, 460 U.S. at 334. Where a common law principle is well established, " . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991) (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783, 96 L. Ed. 1294, 72 S. Ct. 1011 (1952)).

Dahlquist argues that *Briscoe* is not controlling. But he sets out no basis for treating the ADA differently. Contrary to Dahlquist's assertion in his reply brief, the ADA is not broader than 42 U.S.C. §1983. The civil rights statute imposes liability on "*[e]very* person" for "the deprivation of *any* rights . . . secured by the Constitution and laws". 42 U.S.C. § 1983 (underlining added). The purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). The ADA prohibits disability discrimination by a "public entity", 42 U.S.C. § 12132, and does not provide for individual liability. *Walsh v. Nev. Dep't of Human Res.*, 471 F.3d 1033, 1037-38 (9th Cir. 2006). The remedies in the ADA are the same as the

remedies set out in the Civil Rights Act of 1964. 42 U.S.C. §12188. A claim under the ADA is subject to the defense of qualified immunity. *Bartell v. Lohiser*, 215 F.3d 550, 557 (6th Cir. 2000). There is no evident purpose in any provision of the ADA to abrogate the well established common law principle of witness immunity. Although Dahlquist references the Code of Federal Regulations, he cites nothing that provides a basis for believing that the ADA abrogated the witness immunity privilege. Nor is there any authority holding that application of the privilege to the ADA stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Wynn v. Earin, 131 Wn. App. 28, 125 P.3d 829, *rev. gra.*, 158 Wn.2d 1001 (2006), is inapposite. In *Wynn*, the Court found in the Health Care Information Act specific provisions creating a cause of action for the unauthorized disclosure of health care information even in judicial proceedings. *Wynn*, 131 Wn. App. at 39. Dahlquist points to no comparable provisions in the ADA. Testimonial immunity therefore bars any claims against the individuals who testified and any derivative or conspiracy claims based on that testimony.

Dahlquist suggests that the dismissal was premature because he was not allowed discovery. But a dismissal under CR 12(b)(6) is appropriate only if there are *no* facts, hypothetical or otherwise, that would sustain the claims alleged. The claims Dahlquist asserted rest on the testimony given at

trial. If the testimony is privileged, there are no facts that would sustain his claims and discovery is pointless and unnecessary.

Dahlquist argues in his reply brief that even if the officers have immunity, the City, as their employer, does not. Contentions raised for the first time in a reply brief need not be considered. *Yakima County (West Valley) Fire Prot. Dist. v. Yakima*, 122 Wn.2d 371, 397, 858 P.2d 245 (1993). Nevertheless, if the witnesses have immunity, there is no basis for liability against the City. *Cloutier v. Epping*, 714 F.2d 1184, 1191 (1st Cir. 1983). In his opening brief, Dahlquist does not address the dismissal of his claim against the mayor and it is accordingly not addressed in this ruling. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 456, 832 P.2d 1303 (1992) (appellate court will generally not address unbriefed issues).

Kent has requested an award of fees on the ground that the appeal is frivolous.

> In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is

> frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.

Streater v. White, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980).

In light of *Briscoe*, which Dahlquist did not acknowledge in his opening brief, and the lack of any provision in the ADA even remotely suggesting that the ADA abrogates witness immunity, Dahlquist's appeal is very nearly frivolous. But his argument that federal law may preempt the privilege is not frivolous and there is no case dealing directly with application of the witness privilege to the ADA. Resolving all doubts in Dahlquist's favor, the appeal will not be characterized as frivolous. Kent's request for an award of attorney fees on appeal on the ground of frivolity is therefore denied.

Now, therefore, it is hereby

ORDERED that the motion on the merits is granted and the decision of the trial court is affirmed.

Done this 5th day of June, 2007.

/s/ [Illegible]
Court Commissioner

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

DARYL LEROY DAHLQUIST, Appellant, v. CITY OF KENT; KENT CITY JAIL; KENT POLICE DEPARTMENT; BRUCE WHITE, Mayor of the City of Kent, in his official capacity; DARIN MAJACK, PAUL PETER, HARVEY WENDERSKI and DAN MICHAELS, in their official capacity, Respondents.	No. 57879-1-I ORDER DENYING MOTION TO MODIFY (Filed Aug. 17, 2007)

Appellant Daryl Dahlquist moves to modify the commissioner's June 5, 2007, ruling granting a motion on the merits and affirming the decision of the trial court. Respondent has filed a response to the motion to modify. We have considered the motion under RAP 17.7 and have determined that it should be denied.

Now, therefore, it is hereby

ORDERED that the motion to modify is denied.

Done this 17th day of August, 2007

/s/ [Illegible]

/s/ Appelwick, CJ

/s/ Baker, J

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

Hon. Michael J. Heavey

DARYL LEROY DAHLQUIST, Plaintiff, v. CITY OF KENT; KENT CITY JAIL; KENT POLICE DEPARTMENT; BRUCE WHITE, Mayor of the City of Kent, in his official capacity; DARIN MAJACK, PAUL PETER, HARVEY WENDERSKI and DAN MICHAELS, in their official capacity, Defendants.	No. 05-2-33281-6 KNT ORDER GRANTING DEFENDANTS' MOTION TO DISMISS, AND ORDER ON DEFENDANTS' MOTION FOR CR 11 SANCTIONS (Filed Feb. 3, 2006)

This matter having come before the Court on Defendants' Motion to Dismiss the Plaintiff's Complaint for Damages under CR 12(b)(6), and the Court having considered the arguments of the parties, if any, and finding itself fully informed, hereby GRANTS Defendants' motion, and dismisses Plaintiff's Complaint for Damages with prejudice;

In regards to the Defendants' motion for sanctions under CR 11, the Court GRANTS/~~DENIES~~ Defendants' motion, ~~and orders sanctions and fees in the amount of $_____, to be converted into a~~

~~judgment if not paid by certified check or money order within ten (10) days, such instrument made payable to Keating, Bucklin & McCormack, Inc., P.S.~~ [and reserves determination of the amount by later pleading. /s/ o.k. AC]

DONE IN OPEN COURT this 3rd day of February, 2006.

/s/ Michael Heavey
HONORABLE
MICHAEL J. HEAVEY, JUDGE

Presented by:

KEATING, BUCKLIN & McCORMACK, INC., P.S.

/s/ Andrew Cooley
Andrew G. Cooley, WSBA #15189
Of Attorneys for Defendants

THE SUPREME COURT OF WASHINGTON

DARYL LEROY DAHLQUIST, Petitioner, v. CITY OF KENT; KENT CITY JAIL; KENT POLICE DEPARTMENT; BRUCE WHITE, Mayor of the City of Kent, in his official capacity; DARIN MAJACK, PAUL PETER, HARVEY WENDERSKI and DAN MICHAELS, in their official capacity, Respondents.	NO. 80718-3 **ORDER** C/A NO. 57879-1-I (Filed Jun. 4, 2008)

Department II of the Court, composed of Chief Justice Alexander and Justices Madsen, Chambers, Fairhurst and Stephens, at its June 3, 2008, Motion Calendar, considered whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 4th day of June, 2008.

For the Court

/s/ Gary L. Alexander
CHIEF JUSTICE

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(2)

No. 08-292

Supreme Court, U.S.
FILED
DEC 5 - 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DARYL DAHLQUIST,

Petitioner,

v.

CITY OF KENT, WASHINGTON,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Washington

PETITION FOR REHEARING

DARYL DAHLQUIST
Petitioner, Pro se
15238 SE 272d Street
Kent, WA 98042
253-631-2906

PETITION FOR REHEARING

Pursuant to Rule 44.2, Petitioner respectfully petitions this Honorable Court for rehearing.

Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on November 10, 2008, and (2) granting the petition.

In 1969 this Court made a historical decision that "the Court must accept as true all well pleaded allegations of fact and view them in the light most favorable to the petition." *See Jenkins v. McKiethen*, 395 U.S. 411, 421-422 (1969).

To invoke jurisdiction of Federal Court, litigant must have suffered, or be threatened with actual injury traceable to Respondent and likely to be redressed by favorable judicial decision, U.S.C.A. Const. Art. 3, s. 1 *et seq.*

STATEMENT OF SUBSTANTIAL GROUNDS OF A CONTROLLING EFFECT (Rule 44.2)

The definition of retaliation under ADA is broad:

> No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this Act or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding

> or hearing under this Act 42 U.S.C. section 12203 (a).
>
> Notice the wording:
>
> > no person shall discriminate against any individual because such individual . . . made a charge, testified . . . in any manor . . . under this act.

This petition for review comes down to this controlling statement noted by Respondents at page 2 under subheading, "B. Prior lawsuit and trial" in the "City of Kent's response to petition for review" dated 10-16-07. The statement reads:

> "In addition, Mr. Dahlquist claimed the City should have handcuffed him with his hands in front, rather than behind his back.
>
> During the trial of the particular lawsuit, various Kent Police Officers and City Jail staff testified they had never seen such a bracelet." App. 1.

Why were they all testifying about Dahlquist's medical alert bracelet? There is nothing in the discovery litigation process that took place prior to trial, and nothing in the original charge itself were "Mr. Dahlquist claimed the City should have handcuffed him with his hands in front, rather than behind his back."

Remember the Respondents said that "During the trial of the particular lawsuit, various Kent Police Officers and City Jail staff testified they had never

seen such a bracelet." And yet as found months later as noted in Appendix 1 there it is Dahlquist's medical alert bracelet as seen on his right wrist.

On May 18, 2003, Dahlquist found a copy of his January 29, 1997 mug shot picture as taken by Harvey Wenderski at the Kent City Jail in a box of papers his attorney gave him on a single piece of paper actual size shown in Appendix 1.

On January 29, 1997, when Dahlquist was taken into custody that day and transported to the Kent City Jail as testified by Dahlquist the handcuffs were placed on his hands in the front position at all times and there is nothing in the record were Dahlquist ever "claimed the City should have handcuffed him with his hands in front, rather than behind his back."

It is to be declared positively that since June 25, 1993, Dahlquist has never since then been handcuffed at any time since June 25, 1993 with his hands being placed in handcuffs behind his back. Handcuffs were always placed on his hands in the front position from that day on to the very present.

NOW if no one can produce the source of the statement "Mr. Dahlquist claimed the City should have handcuffed him with his hands in front, rather than behind his back" then the statement is a false statement the only purpose of which is to mislead the court about the truth (a ruse used to destroy Dahlquist's credibility when his credibility wasn't an issue) and Dahlquist acknowledges that retaliation in

the form of perjury is a very effective form of discrimination as is noted by the following.

On January 25, 2003, Dahlquist telephoned one of the juror's at his ADA trial a man named Donald Bonds and asked him the following question:

> Dahlquist. "I would like to ask you a question?"
>
> Jurist. "OK."
>
> Dahlquist. "The issue with the medical alert bracelet. How did that affect you?"
>
> Jurist. "I don't want to talk about it."
>
> Dahlquist. "That's OK, because I turned them into the Mayer's Office for perjury."
>
> Jurist. "You threatening me?"
>
> Dahlquist. "No, I just wanted to ask you about the medical alert bracelet."
>
> Jurist. "Hey, buddy. You got just what you deserved."

App.'s brief, p.25-26. CP 139.

Please incorporate herein by reference as if set forth in full the case of *Kroske v. US Bank Corp.*, 04-35187 (9th Cir. 2005).

The State common law privilege or immunity for witness testimony does not override federal statutory law condemning retaliation under the Americans With Disabilities Act.

The Defendants claim that they are immune from an action under the Americans With Disabilities Act because of the existence of a state common law immunity which protects witnesses who are participants in litigation. The Ninth Circuit Court of Appeals does not share this opinion.

The Ninth Circuit recognizes the priority given the Supremacy Clause of the United States Constitution, Article IV, which gives Congress the power to preempt state and local laws. *Oxygenated Fuels Ass'n v. Davis*, 331 F.3d 665, 667 (9th Cir. 2003). The Ninth Circuit continues to support the proposition that federal interests will prevail where state law "stands as an obstacle to the accomplishment of the purposes or objectives of Congress." *Pardi v. Kaiser Foundation Hospitals*, 389 F.3d 840, 851 (9th Cir. 2004). An example of this preemption is found in a 42 U.S.C. § 1983 case where the Ninth Circuit held that California's statutory litigation privilege would not bar an action under that Federal Civil Rights Act, 42 U.S.C. § 1983. *Pardi*, *supra,* citing *Kimes v. Stone*, 84 F.3d 1121, 1127 (9th Cir. 1996). The Court in *Kimes* observed that federal courts will not allow a state immunity defense to have the effect of transmuting "a basic guarantee into an illusory promise; and the supremacy clause of the Constitution ensures that

the proper construction may be enforced." *Kimes*, *supra*, at 1127, cited by *Pardi*, *supra*, at 851.

The Court in *Pardi* applied the rationale of *Kimes* to an ADA proceeding. That Court noted that it was not alone in imposing this kind of restriction upon application of state law. *Id.* at 851. In *Pardi*, the Court reversed summary judgment which was granted based on claims that the defendant was entitled to litigation immunity under California law for retaliatory and discriminatory acts pursued under the ADA. As the commissioner stated on June 5, 2007:

> In light of *Briscoe*, which Dahlquist did not acknowledge in his opening brief, and the lack of any provision in the ADA even remotely suggesting that the ADA abrogates witness immunity,[1] Dahlquist's appeal is very nearly frivolous. But his argument that federal law may preempt the privilege is not frivolous and there is no case dealing directly with application of the witness privilege to the ADA. Resolving all doubts in Dahlquist's favor, the appeal will not be characterized as frivolous. Kent's request for an award of attorney fees on appeal on the ground of frivolity is therefore denied.[2]

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[1] *See* App. 2 of this brief.

[2] *See* App. 9 of the Petition for Writ of Certiorari filed in this matter.

CONCLUSION

For the foregoing reasons, as well as those contained in the Petition for Writ of Certiorari, the petition for rehearing should be granted and the petition reconsidered.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this Petition for Rehearing is submitted in good faith and not for delay. This Petition for Rehearing is restricted to the grounds set out in Rule 44.2.

DARYL DAHLQUIST
Petitioner, Pro se

App. 1

The Commissioner's ruling was based in substantial part upon the U.S. Supreme Court decision in *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983). App. 5 through App. 6. That case held that the common law witness privilege, in existence in 1871 at the time of enactment of 42 U.S.C. § 1983, applied to Civil Rights cases. *Briscoe* affirmed a ruling of the Seventh Circuit that witnesses were absolutely immune from damages in a 42 U.S.C. § 1983 case. On the other hand, the Seventh Circuit did not extend its ruling in *Briscoe* to ADA claims. *Steffes*, supra.*

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* *See* page 8 of the Petition for Writ of Certiorari filed in this matter.